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513	7590	06/15/2009	EXAMINER	
WENDEROTH, LIND & PONACK, L.L.P.			GWARTNEY, ELIZABETH A	
1030 15th Street, N.W.,				
Suite 400 East			ART UNIT	PAPER NUMBER
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## **ATTACHMENT TO ADVISORY ACTION**

Applicants' amendment to the claims filed on 06/03/09 has been entered.

The previous 112 2<sup>nd</sup> paragraph rejections have been withdrawn in light of applicants' amendment made 06/03/09.

### ***Rejection of claims 39, 42-43, 46 and 65 under 35 U.S.C. §102(b)***

Applicant argues that Garcia-Mina et al. "merely teach a composition for the control of post-harvest pathologies, including those caused by pathogenic agents, mainly funguses and bacteria, and by chemical degeneration (either scalding and oleocellosis)", and fails to teach a method for reducing phytotoxicity caused by physical and/or chemical treatment applied to fruit or vegetable (i.e. claim 39) or a method for treating a fruit or vegetable which includes a physical treatment by means of heat or cold (i.e. claim 65). Applicants argue that there is a manipulative difference between the claimed method and the disclosure of Garcia-Mina et al., which fails to disclose two distinctive steps and the phytoprotective effect thus achieved.

Applicants' argument is not persuasive. Garcia-Mina et al. clearly discloses a method comprising: applying a composition containing (a) an active ingredient selected from the group consisting of eugenol, terpineol, and geraniol (i.e. chemical treatment); and (b) a surface active including lecithin (Abstract, [0001], [0016] and [0019]). Further, Garcia-Mina et al. disclose bathing the fruits and vegetable at a temperature of 45° to 80°C in a composition comprising lecithin and an active ingredient (i.e. chemical treatment) ([0019], [0032]).

While Garcia-Mina et al. disclose a method for controlling post harvest pathology of fruits and vegetables (i.e. affliction of pathogenic agents and process of chemical degeneration of the skin), given that Garcia-Mina et al. disclose a method identical to that presently claimed, it is

clear that such method would inherently reduce phytotoxicity of physical and/or chemical treatment.

***Rejection of claims 39 and 42-44 under 35 U.S.C. §103(a)***

Applicants argue that Mulder and Garcia-Mina et al. do not provide “any suggestion to carry out a method comprising the two distinctive steps of treating the fruit or vegetable by applying heat or cold or a specified chemical treatment as recited in claim 39, and applying a composition comprising lecithins and/or derivative thereof to the fruit or vegetable, nor do the references suggest the phytoprotective effect thus achieved.” In particular, applicants explain that the claimed method provides an unexpected effect of reducing phytotoxicity of physical and/or chemical treatment.

Applicants' argument is not persuasive. Mulder clearly discloses a method comprising: applying a composition containing (a) lecithin (C1/Abstract; and (b) other substance, including fungicides and/or bactericides (i.e. chemical treatment – C5/L1-3). Garcia-Mina et al. teach the use of eugenol to control post-harvest pathologies of fruit and vegetables (Abstract, [0021]). Garcia-Mina et al. teach that eugenol is an eco-compatible ingredient that does not have any risk for human health ([0017]). It would have been obvious to one of ordinary skill in the art at the time of the invention to have used eugenol, as taught by Garcia-Mina et al., as a treatment agent in the composition of Mulder because it is an eco-compatible ingredient that does not have an risk for human health.

Because the combination of Mulder and Garcia-Mina et al. disclose a method identical to that presently claimed, such method would intrinsically reduce phytotoxicity of physical and./or chemical treatment.

Applicant alleges unexpected results based on evidence presented in a Declaration under Rule 132 filed 06/03/09. The question as to whether unexpected advantage has been demonstrated is a factual question. *In re Johnson*, 747 F.2d 1456, 1460, 223 USPQ 1260, 1263 (Fed. Cir. 1984). Thus, it is incumbent upon applicant to supply the factual basis to rebut the prima facie case of obviousness established by examiner. See, e.g., *In re Klosak*, 455 F.2d 1077, 1080, 173 USPQ 14, 16 (CCPA 1972). Applicants, however, do not provide an adequate explanation regarding any factual showing in the specification of unexpected results as data has not been shown to be commensurate in scope with rejected claims. For example, neither of the claims rejected under Mulder and Garcia-Mina et al. are limited to eugenol as a chemical treatment agent. Nor have the applicants shown that comparison samples in said Declaration fairly represent the closest prior art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth Gwartney whose telephone number is (571) 270-3874. The examiner can normally be reached on Monday - Friday; 7:30AM - 3:30PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./  
Examiner, Art Unit 1794

/KEITH D. HENDRICKS/  
Supervisory Patent Examiner, Art Unit 1794